No. 2845

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL CALLAHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

GOVERNMENT'S BRIEF

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Statement of Case

The indictment (p. 3 trans.) charges:

> "That said Daniel Callahan on the 25th day of June A. D. one thousand nine hundred and fifteen, at Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, did then and there willingly, unlawfully and feloniously carnally know and abuse one Grace Carey, a female child under the age of sixteen years, to-wit: of the age of fourteen years, he, the said Daniel Callahan, being then and there a male person over the age of twenty-one years, etc."

The defendant was given a jury trial and found * * * guilty of the crime of rape, as charged in

the indictment and sentenced to twelve years' imprisonment.

Argument

While the transcript in this case sets forth many assignments of error, a careful review of these assignments will show that most of them are trivial and without merit. In fact, counsel for plaintiff in error have ignored all but seven of said assignments of error and the Government now desires to direct attention to those assignments which counsel deem of sufficient importance to mention in their opening brief.

The assignments of error above referred to, and which plaintiff in error claims to be sufficiently prejudicial to justify a reversal, are as follows:

I.

That:

> "The indictment is *not* sufficient to charge the crime of constructive rape, under Section 1894, Compiled Laws of Alaska, because the carnal knowing is not alleged to have been *'with her consent'.*"

II.

That:

> "The Court denied defendant a public trial of his case, in violation of Article VI of the Amendments of the Constitution of the United States, providing:
>
> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *'."

The record, as set forth in the transcript, shows that:

> "On the Court's own motion, the Court ordered that all persons of the general public, not properly having business before the Court, be excluded from the courtroom during the trial of this cause, to which ruling counsel for the defendant notes an exception, which exception was allowed."

III.

That the Court erred in admitting the evidence of Laura Herrington to the effect that shortly after the occurrence of the alleged crime, she had a conversation with the complaining witness, Grace Carey, and that Grace Carey showed her three dollars, which plaintiff in error had given her, and that Grace Carey said that "Dan (defendant) had pushed her."

IV.

That the Court erred in allowing the prosecutrix Grace Carey to testify as follows:

> "Q. Tell the jury who was the first man that ever had sexual intercourse with you?
>
> A. Dan Callahan.
>
> Q. Where did that occur?
>
> A. Over to Dan Callahan's house.
>
> Q. Did he give you anything particular after that?
>
> A. Yes, he gave me twenty-five cents."

V.

That there is no evidence in this record from Grace Carey that Dan Callahan ever carnally knew and abused the prosecuting witness, Grace Carey.

VI.

That the Court erred in permitting the witness Laura Herrington to give the following answers to the following questions:

"Q. Did you ever have a conversation with Dan Callahan, in his house, about Grace Carey?

A. Yes.

Q. When was that? How old were you when that conversation took place?

A. Twelve years old.

Q. Just tell the jury what Dan Callahan said to you at that time about Grace Carey?

A. He said he did that to Grace and that she was not afraid."

VII.

That the Court erred in giving the following instruction that:

"The defendant is charged with rape on the person of Grace Carey, committed on the twenty-fifth day of June, 1915, * * * nevertheless, where, as in this case, the prosecution by its evidence has elected to prove an offense upon a certain day, to-wit: the twenty-fifth day of June, 1915, they are bound to prove to your satisfaction, beyond a reasonable doubt, that such offense was committed by the defendant

> at the time and place testified to by the witnesses in this case, and in the manner and form as charged in the indictment, before you can find the defendant guilty."

In answering the objections of plaintiff in error in the order that they appear in the brief, the Government takes the position that the indictment is not defective because it failed to allege that the carnal knowledge was *with her consent* (referring to the consent of the said Grace Carey), and in this connection attention is called to the fact that a careful review of all of the authorities cited on page of counsels' brief, in support of the position that it was necessary to allege the phrase "with her consent," in the indictment, was not germane to the point in issue, with perhaps one exception, and that is the case of *State* vs. *Carl,* decided by the Supreme Court of Ohio, January 3, 1905, and reported on page 463, 73 Northwestern Reporter; and counsel for plaintiff in error must have read the dissenting opinion, otherwise they would not have cited this case in support of their proposition, for the opinion supports the position taken by the Government and is directly opposed to that taken by the plaintiff in error.

The facts are as follows:

Carl was indicted by the Grand Jury for abusing and carnally knowing a female person under the age of sixteen years, he being more than eighteen years of age. The indictment charged that the defendant "being then and there a male person of the

age of eighteen years and upward, did unlawfully, knowingly, carnally know and abuse one E. W. *with her consent,* she, the said E. W. then and there being a female person under the age of sixteen years, to-wit: of the age of fourteen years, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." When, upon the witness stand, she testified that she *did not consent* to the intercourse, but that it was accomplished by the defendant forcibly and against all the resistance she was able to interpose. Thereupon counsel for defendant asked the Court to direct the jury to return a verdict for the defendant upon the ground that, *with respect to her consent,* there was a fatal variance between the indictment and the evidence. That direction was given by the Court, and the prosecuting attorney's exception thereto presents the question which is for consideration here.

Judge Shanck, in determining the matter, said:

> "The ruling of the Judge of the Court of Common Pleas must have been prompted by the view that the phrase 'with her consent' defines an essential element of the crime charged. At least, that view pervades the brief in support of the ruling. To justify the ruling it is essential that the view be maintained, since a variance is a disagreement between the allegations and the proof in an essential matter. *In this view, the omission of the phrase 'with her consent' would have rendered the indictment fatally defective,* because of the failure to charge an essential element of the crime. It imputes to the Legislature an intention to make

> an act of the character of this a crime if committed *with consent,* although under the circumstances it would not be if committed *without consent. Obviously the terms of the statute do not require that it be so astonishingly interpreted.* In this regard the effect of the statute is to nullify the consent of the female under sixteen years of age. It is as if with respect to such persons the provision was that the crime shall be complete notwithstanding her consent. To say that the view taken by the Judge of the Court of Common Pleas is necessary in order that the accused may have proper opportunity to prepare his defense, is only another mode of presenting the same *misconception of the statute.* The essential elements of the crime charged are the commission of the act by a male person more than eighteen years of age upon a female person less than sixteen years of age. * * *"

For other authorities on the point that it is not necessary to allege in the indictment that the act was committed "with her consent," see 33 Cyc., page 1444, and other cases cited.

Section 1894 of the Compiled Laws of Alaska provides:

> "That whoever has carnal knowledge of a female person, forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, *with her consent,* is guilty of rape."

Under this section it is obvious that the indictment would be good, either with, or without the phrase "with her consent," as the phrase "with her

consent'' is only inserted for the purpose of showing that the perpetrator of the crime is guilty of the crime of rape upon a female person under the age of sixteen years, even though she consents to the same. Plaintiff in error could not have been misled, or in any way prejudiced by the omission of this phrase since he would be guilty of the crime of rape if he carnally knew the female in question while she was under the age of sixteen.

In answer to the second assignment of error, to the effect that ''the Court denied the defendant a public trial in violation of Article VI of the Amendments to the Constitution of the United States,'' the Government first directs attention to the order of the Court, which is as follows:

> ''On the Court's own motion, the Court ordered that all persons of the general public, not properly having business before the Court, be excluded from the courtroom during the trial of this cause.''

This question has already been determined in this Circuit, in the case of *Regan* vs. *United States*, 202 Fed. 488, and since this case so clearly recites the rule governing the question, the Government feels safe in referring only to this case as an authority which conclusively settles the question.

However, where the evidence is of a particularly indecent and vulgar character, the Court undoubtedly has the right to exclude from the courtroom the general public, or those who do not have

business before the Court. This may be done in the interests of public morality.

People vs. *Hall,* 51 N. Y. Appeals, Div. 57, 64 N. Y. Suppl. 433.

In reply to the third assignment of error, that the Court erred in permitting Laura Herrington to testify to a conversation that she had with the prosecuting witness, Grace Carey, the Government calls attention to the fact that this conversation was had immediately following the crime (Trans. pp. 40, 43, 44, 45), and while the facts were exceedingly fresh in the mind of the prosecuting witness. The rule seems to be well established that the injured party may make complaint of the injury, if done so recently after the occurrence of the crime.

People vs. *Wilmot,* 139 Cal. 103.

In this case, after discussing the question of the introduction of evidence concerning the complaint of an injured person, violently assaulted and outraged, and the reason for allowing the evidence of such complaint to be introduced, the Court further stated as follows:

> "The reason for the rule admitting such testimony would appear to be wanting in the case where the act is accomplished with a female who fully understands the nature thereof, and freely and voluntarily submits thereto. Doubtless, however, evidence of the fact of complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this Court has in this respect made no distinction between cases where there

> was actual resistance and those where resistance and non-consent were conclusively inferred by the law."

Counsel for plaintiff in error contend that the conversation between the witness Laura Herrington and Grace Carey was not in the nature of a complaint and inadmissible, but the complaint in question was so soon after the crime that it might well be considered a part of the *res gestae.*

> *Barnes* vs. *State,* 88 Ala. 204, 16 Am. State Reports 48, 7 So. Report 38;
>
> *State* vs. *Fitzsimmons,* 18 R. I. 236, 49 State Reports 766.

In discussing the general rule concerning the introduction of the evidence covering the complaint made in a case of this kind, the Court, in the case of *State* vs. *Hoskinson,* 96 Pac. Rep., pp. 138-140, stated as follows:

> "In the case of an adult person who had consented to the act, a complaint would not be expected, and so it was said in the Daugherty case, that, the reason failing, the rule also fails. *The reason, however, does not fail where outrages are charged upon children of tender age.* For such children to make complaints of such abuse to their mothers, or others in whom they confide, is natural, and the testimony that they did so may properly be admitted in the discretion of the Court, in view of the age and intelligence of the child, and the time when, and the circumstances under which, the complaints were made, having regard to the reason upon which the rule rests. This child was thirteen years of age and the ruling of the Court

admitting testimony of her complaints would be approved if such testimony had been limited to the fact that she did so complain."

Many cases hold that the particulars of the complaint are admissible where the prosecutrix or party assaulted is of tender years.

People vs. *Marrs,* 125 Mich. 376, 84 N. W. 284;

People vs. *Glover,* 71 Mich. 303, 38 N. W. 874;

People vs. *Gage,* 62 Mich. 271, 28 N. W. 835, 4 Am. State Rep. 854;

Hannon vs. *State,* 70 Wis. 448, 36 N. W. 1.

In reply to the fourth assignment of error set forth on page 12 of counsels' opening brief, to the effect that the Court erred in permitting the prosecuting witness, Grace Carey, to testify to other acts of sexual intercourse with defendant, the Government calls attention to all of the testimony given by her on this subject, which is as follows:

"Q. Did the defendant, Dan Callahan, have sexual intercourse with you before that time?

A. Yes; lots of times.

Q. When was the first time (Objection of defendant's counsel.)

A. Before he went down to Ruby.

Q. How old were you?

A. I was only about nine years old, about ten; either nine or ten.

Q. Tell the jury who was the first man that had sexual intercourse with you. (Counsel for defendant objects.)

A. Dan Callahan.

Q. Where did that occur?

A. Over to Dan Callahan's house.

Q. Did he give you anything particular after that?

A. Yes, he gave me twenty-five cents.

Q. Where, let us know, did he have sexual intercourse with you?

A. Over at his barn and at his house and another little house right near the barn.

Q. In the town of Fairbanks?

A. Yes.

Q. Did you ever tell anybody about this except Laura Herrington?

A. No.

Q. Is she the only one?

A. Yes."

Prior solicitations to have intercourse with accused have been held to be admissible.

Wharton's Criminal Law, p. 899;

State vs. *Allison,* 24 S. D. 622, 124 N. W. 747.

And evidence of prior acts of intercourse and statements of defendant are proper matters of investigation and admissible.

State vs. *Sysinger,* 25 S. D. 110, 125 N. W. 879;

People vs. *O'Sullivan,* 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880;

Lawson vs. *State,* 20 Ala. 65, 56 Am. Decisions 182;

33 Cyc. 1458, and cases cited;

State vs. *Marvin,* 35 N. H. 22;

Wharton's Criminal Evidence, 45, 46, 49.

In view of the above decisions it cannot be said that the questions asked of the prosecuting witness and the answers given by her concerning acts of intercourse, other than the act for which defendant was indicted, resulted in prejudicial error.

In reply to the fifth assignment of error, referred to on page 12 of the brief of plaintiff in error, to the effect that there was no evidence to show that the defendant ever carnally knew the prosecuting witness, the Government first directs attention to the latter's testimony (pp. 39, 40, 41 trans.). The evidence shows very clearly that the prosecuting witness went to the home of defendant, removed part of her clothes, at which time the defendant got on top of her and had "full sexual intercourse" with her.

The rule is well settled that penetration may be proved even by circumstantial evidence.

State vs. *Devorss,* 221 Mo. 469, 120 S. W. 75.

In the present case, however, the testimony appears to be conclusive. Proof of intercourse is sufficient proof of penetration—especially where the female is under the statutory age of consent.

Wharton Criminal Law, p. 871;

State vs. *Devorss,* 221 Mo. 469, 120 S. W. 75.

With the testimony of the prosecuting witness and the corroborating circumstances, there should be no question as to the sufficiency of the evidence to support the verdict of the jury.

State vs. *Bartlett,* 127 Iowa 689, 104 N. W. 285;

State vs. *Waters,* 132 Iowa 481, 109 N. W. 1013;

State vs. *Ralston,* 139 Iowa 44, 116 N. W. 1058.

It is idle for counsel to compare this case with the Wooldridge case recently decided by the above Court, for they are as different as night and day. In the Wooldridge case we were dealing with an attempt to commit the crime of rape, while here, we are dealing with the actual commission of the crime. In the Wooldridge case there was no overt act shown on the part of defendant, while in the present case there is ample evidence to show the commission of the crime of rape.

Assignment six on page 16 of counsel's opening brief, to the effect that the Court erred in permitting the witness Laura Herrington to testify concerning a conversation she had had with defendant, is fully answered in the Government's reply to the fourth assignment of error herein.

In answer to the seventh and last assignment of error, set forth in the brief of plaintiff in error, to

the effect that the Court erred in giving the following instruction to the jury, namely:

> "Nevertheless, where, as in this case, the prosecution by its evidence has elected to prove an offense upon a certain day, to-wit: the twenty-fifth day of June, 1915, they are bound to prove to your satisfaction, beyond a reasonable doubt, that such offense was committed by the defendant at the time and place testified to by the witness in this case, and in the manner and form as charged in the indictment, before you can find the defendant guilty."

The Government is of the opinion that this instruction is incorrect insofar as it compels the prosecution to prove that the crime of rape was committed on the very date that it was alleged in the indictment to have been committed, but inasmuch as the evidence would indicate that the crime was committed on or about that date and the jury "found the defendant, Dan Callahan, guilty of the crime, as charged in the indictment," the defendant is now in no position to complain of the instruction. In a crime of this character it is not essential to prove its commission upon a particular date.

33 Cyc. 1455, and cases cited.

But inasmuch as the jury was satisfied that the crime was committed upon the date alleged in the indictment, from the evidence introduced, their verdict should not be disturbed.

In conclusion, the Government, after giving this case a careful consideration, is of the opinion that

the errors which crept into the record, if any, were not prejudicial to the rights of the defendant and are not sufficient to justify the Court in reversing the judgment rendered in the lower Court.

Respectfully submitted,

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